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Robert. L. Joseph v. Salt Lake City Civil Service
Commission, Salt lake City Corporation, Salt Lake
City Police Department, and the Chief of Police :
Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

ROBERT L. JOSEPH,

PETITIONER,

VS.

**SALT LAKE CITY CIVIL SERVICE
COMMISSION, SALT LAKE CITY
CORPORATION, SALT LAKE CITY
POLICE DEPARTMENT, AND THE
CHIEF OF POLICE,**

RESPONDENTS.

BRIEF OF THE PETITIONER

APPEAL NO. 20010399-CA
PRIORITY NO. (14)

BRIEF OF THE PETITIONER

**AN APPEAL FROM A DECISION ISSUED BY THE SALT LAKE CITY CIVIL SERVICE
COMMISSION ON APRIL 9, 2001.**

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PUBLISHED DECISION

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PUBLISHED DECISION

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BRIEF OF THE PETITIONER

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PRIORITY NO. (14)

Officer Joseph was terminated from the Salt Lake City Police Department. Joseph appealed his termination to the Salt Lake City Civil Service Commission and was scheduled for hearing. Prior to the hearing the City filed a Motion to Dismiss Appeal for Failure to Cooperate with Discovery. The City demanded evidence not relevant to the termination hearing by exploiting alternative procedures under threat of dismissal. During a meeting before the Commission Joseph was ordered to produce the irrelevant materials. The Commission failed to issue a certified order to compel, and did not specify what materials it required Joseph to produce. Joseph produced relevant documents and materials. The City filed a Motion to Enforce. The Commission issued an Order of Dismissal before Joseph could respond to the City's motion. The Commission violated Officer Joseph's due process rights.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Rule 14 of the Utah Rules of Appellate Procedure and Utah Code Ann. § 10-3-1012.5 (as amended).

STATEMENT OF ISSUES PRESENTED

(1) Whether the Commission effectively denied Officer Joseph his due process rights when it dismissed Joseph's termination hearing without good cause.

(2) Whether the Commission's order to produce unspecified evidence absent of a written certified order was valid.

(3) Whether the City and Ms. Stonebrook used the Commission to extort, by threat of dismissal evidence not relevant to the proceedings intended for other matters before the Federal Court. Ms. Stonebrook with deliberate indifference to Joseph's due process rights used the Commission to exploit alternative procedures.

(4) Whether the Commission acted with prejudice towards Joseph by allowing City Attorney Martha Stonebrook to act as counsel for the Commission in violation of their own conflict of interest rules.

(5) Whether the Commissions findings, ruling and punishment were inconsistent and grossly disproportionate to the offense.

STANDARD OF REVIEW

The standard of review for issues (1),(2),(4) is a correction of error standard, giving no deference to the Commission's decision. Taylor v. Utah Dept. of Commerce, 952 P.2d 1090 (Utah App. 1998); King v. Industrial Comm'n of Utah, 850 P.2d 1281 (Utah App. 1993)

The standard of review for issues (3),(5) is an abuse of discretion standard.

Utah Code Ann. § 10-3-1013; Child v. Salt Lake City Civil Service Comm’n ,575 P.2d 195 (Utah 1978); Lucas v. Murray City Civil Service Comm’n, 949 P.2d 746 (Utah App. 1997)

STATUTES, ORDINANCES, RULES, AND REGULATIONS

United States Constitution Amendment XIV, Sec. 1

Utah Constitution Article XI, Sec. 5

Utah Code Ann. §§ 10-3-1001 to 06

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Utah Code Ann. § 10-3-912

Utah Code Ann. § 34A-1-302 (4)

Utah Rules of Appellate Procedure 14

Salt Lake City Code. § 2.16.060

Salt Lake Civil Service Rules and Regulations, §§ 7-6-6; 7-6-7; 1-3-2

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from the Salt Lake City Civil Service Commission’s (“the Commission”) Order of Dismissal dated April 9, 2001. (R. 108-09). The Commission has refused to hear Officer Joseph’s appeal of his March 31, 2000, termination from the Salt Lake City Police Department in violation of Officer Joseph’s Due Process Rights. The Commission dismissed Joseph’s appeal on the basis that Joseph failed to comply with the Commission’s unwritten order to compel him to produce unspecified or unrelated evidence by March 30, 2001, under threat of dismissal. (R. 066-67).

B. Course of Proceedings

On March 31, 2000, Officer Joseph was terminated from the Salt Lake City Police Department for allegedly being “unfit for duty.” Officer Joseph filed an appeal with the Salt Lake City Civil Service Commission on April 19, 2000. (R.004-7)

On March 15, 2001 during a meeting before the Civil Service Commission, Martha Stonebrook discussed dismissing Joseph’s case for failure to cooperate with discovery. Joseph’s termination hearing was originally scheduled for March 22-23, 2001. Joseph’s attorney Eric Strindberg and Martha Stonebrook stipulated to set another date for the hearing and agreed to a discovery cut off date of March 30, 2001. The Commission suggested that if Joseph did not meet the cut off date of March 30, 2001, his case would be dismissed. The Commission did not specifically identify what items of evidence it required Joseph to produce. (R. 066-7). The Commission also failed to produce an order compelling Joseph to produce anything. (R. 001-002).

On March 30, 2001, Joseph’s attorney Eric Strindberg delivered to Ms. Stonebrook 258 pages of documents and other exhibits in response to the City’s request. Ms. Stonebrook had previously been informed that Eric Strindberg would be out of the office on March 30, 2001, and would provide her with the two requested tapes on Monday April 2, 2001, after he had been given the opportunity to listen to the tapes. Joseph delivered the requested tapes to Strindberg’s office on March 30, 2001 and the tapes were delivered to Ms. Stonebrook on April 2, 2001 after they were reviewed by Strindberg. (R. 110-11)

On April 2, 2001, Ms. Stonebrook, after receiving the 258 pages of documents and two audio tapes, filed a Motion to Enforce Order. (The Commission never produced a written order, nor did they identify any specific items of evidence that needed to be produced.) (R. 071-75; 121-22).

On April 7, 2001, Eric Strindberg wrote to the Commission and stated that he would be filing a Motion in Opposition to the City's Motion to Enforce. (R. 111-12; 124). On April 9, 2001, the Commission issued an Order of Dismissal and effectively denied Joseph the right to file a Motion in Opposition. (R. 108-9).

On April 17, 2001, Eric Strindberg filed a Motion to Strike the Commission's Order to Dismiss. (R. 110-133). On April 19, 2001, the Commission agreed to hold a hearing on the argument of dismissal. (R.190-214). On April 23, 2001, the Commission upheld the Order of Dismissal. (R.216).

It is from this administrative hearing that Officer Joseph appeals to this Court on the basis of Due Process violations and disparity on the issues of discovery. Ms. Stonebrook and the Commission have violated Officer Joseph's due process rights by dismissing the case and have attempted to gain access to evidence not applicable to the matter before the commission by way of threat, exploitation and abuse of alternative procedures. (R. 067; 121-22; 126-27; 129-132).

Officer Joseph appeals to this Court to find that Joseph's due process rights were violated and order the City to reinstate him as an officer or, in the alternative, to remand the case to the Commission or independent body for hearing.

C. Disposition in Trial Court or Agency

On April 9, 2001, the Commission entered its Order of Dismissal. On April 23, 2001, the Commission denied Joseph's Motion to Strike Order of Dismissal. (R. 190-

D. Statements of Facts

BACKGROUND

Other Related Issues Before This Court

1. Robert L. Joseph ("Joseph"), Petitioner herein, was employed by Salt Lake City as a Police Officer on April 10, 1997, thru March 31, 2000.
2. On March 26, 1999, Officer Joseph was involved in a shooting incident after a traffic stop that led to him being charged with aggravated assault on April 19, 1999 after investigators claimed that Joseph was not in any threat of serious bodily injury at the time of the shooting.
3. On July 16, 1999, Joseph was terminated from the police department after Internal Affairs Investigators erroneously concluded that the evidence did not support Joseph's use of deadly force.
4. The charges against Officer Joseph were dismissed with prejudice by Judge Burton on November 23, 1999, after it was determined that the evidence supported Joseph's actions. The District Attorney's office concluded that Officer Joseph was justified in the use of deadly force.
5. On December 21, 1999, Salt Lake City offered to reinstate Officer Joseph to the police department and rule the shooting "in policy" on condition that Joseph withdraw his appeal before the Civil Service Commission. Joseph was also advised that he would have to drop his Civil Rights action against the City. Officer Joseph refused to withdraw his appeal or drop his Civil Rights action against the City.
6. On January 3, 2000, in a blatant act of retaliation Salt Lake City reversed its position and determined that Officer Joseph's use of deadly force was "out of policy" and imposed a twenty day suspension and ordered Joseph to undergo a fitness for duty evaluation.
7. As a result of many different problems and inconsistencies with the department's case Joseph believed that the investigation was corrupt and seriously flawed, and that the

department was actively participating in spoliation of evidence, obstruction of justice, and the violation of Joseph's constitutional rights.

8. Officer Joseph appealed the department's ruling of "not justified" with the twenty suspension to the Salt Lake City Civil Service Commission on January 7, 2000.

9. Joseph's appeal was heard before the Commission on April 11 & May 8, 2000.

10. On December 6, 2000, the Commission issued its Findings of Fact, Conclusions and Order affirming the departments "out of policy" ruling with a twenty day suspension.

11. Officer Joseph appealed the Commissions findings to the Utah Court of Appeals on December 20, 2000. (Utah Court of Appeals No: 20001111-CA)

MATTER BEFORE THE COMMISSION

Officer Joseph Was Terminated For Allegedly Being Unfit For Duty.

12. On February 3, 2000, Officer Joseph underwent a Psychological evaluation arranged by the City with Dr. David McCann.

13. On February 28, 2000, Connole suspended Joseph for allegedly being unfit for duty. Joseph was disarmed and then escorted out of the building and was told that he would be fired.

14. On March 14, 2000, Joseph met with Connole at a pre-termination hearing and was given information from the City's Psychiatrist, Dr. McCann for the first time. Connole and Salt Lake City failed to provide McCann with a complete personnel history on Joseph. Connole excluded merit ratings that were favorable to Joseph along with some letters of accommodation. There was also a letter sent to risk management by Union President Greer who made false allegations about Joseph. This letter was then sent by risk management's Jeff Rowley to Dr. McCann. Joseph denied the allegations and stated that he had tape recorded

the meeting and gave several names of officers who attended the meeting that could refute the false allegations made by Greer. The City failed to interview any of the officers or take into consideration the tape. Joseph was not provided this information prior to the pre-termination which grossly prejudiced Joseph's due process rights.

15. McCann also had Joseph assessed by an independent assessment company, Dr. Leslie Cooper, who determined that Joseph was not suffering from any psychological problems.

16. On March 31, 2000, Connole terminated Joseph's employment alleging that Joseph was unfit for duty and posed a danger to himself and others if allowed to remain a police officer. Connole failed to investigate the false allegations made by Greer.

17. Prior to Joseph's employment with the Salt Lake City Police Department he underwent extensive testing and evaluation. Joseph, successfully completed all the stages of the evaluation and testing process, which included an extensive psychological examination by Dr. Thomas Reidy from Law Enforcement Psychological Services based out of California, who determined that Joseph was fit for duty and considered suitable for Law Enforcement.

18. Officer Joseph had also underwent a post-shooting psychological evaluation at the direction of Captain Folsom as per policy, by VRI's Michelle Myers on March 31, 1999, and was cleared to return to duty.

19. Dr. McCann concluded that Joseph was unfit for duty and stated that Joseph's claims of civil rights violations by the City were unfounded "unjustified doubts" and recommended that he be terminated. McCann made his determination from information provided to him by the City, which excluded the full investigative file, the information from the dismissal of criminal charges, several positive (more recent) merit ratings which

would conflict with his findings and Joseph's pre-employment psychiatric evaluation.

20. Joseph, since being terminated on March 31, 2000, has undergone two separate psychological evaluations. McCann's conclusions were evaluated by Dr. Eric Nielsen and determined to be lacking merit. Dr. Nielsen is a recognized expert in fitness for duty evaluations and has published many documents related to the field of law enforcement, fitness for duty evaluations and post-traumatic stress. Dr. Nielsen published Salt Lake City's manual on Deadly Force Policy, Shooting and Post Shooting Reactions which is still in use.

21. Dr. Nielsen referred Joseph to a Dr. Stephen Golding, University of Utah Professor working in the field of forensic science and psychiatry. Dr. Golding has also invalidated Dr. McCann's findings and determined that McCann has insufficient information to formulate his conclusions. Dr. Golding has determined that Joseph is fit for duty.

22. On July 17, 2000, Joseph also had another fitness for duty evaluation for pre-employment with another Utah agency and was determined fit for duty by Dr. Carol Nudleman from Colorado based Headquarters for Psychological Evaluations.

ISSUE CURRENTLY ON APPEAL

Joseph's Appeal Before The Civil Service Over The Fitness For Duty Termination.

23. On April 5, 2000, Officer Joseph filed an appeal with the civil service contesting his termination on March 31, 2000, for allegedly being unfit for duty. (R. 004-7).

24. Salt Lake City has continually failed to produce items essential to Joseph's case not allowing Joseph to move forward with his appeal.

25. On March 15, 2001, the Civil Service Commission at the request of Stonebrook ordered Joseph to produce two tapes. One tape was of Joseph's interview with Dr. McCann

on his fitness for duty evaluation, the other was of a meeting between Joseph and Chief Connole. There was no hearing to discuss the relevancy of the tapes. The Commission ordered Joseph to produce the tapes under threat of dismissal. There was no written order produced by the commission to compel.

26. Officer Joseph was deposed in a Federal civil rights case, Scott vs. Salt Lake City, on March 26, 27 & 29, 2001. During depositions it was disclosed by Officer Joseph that he had made many tapes of conversations between Joseph and City employees. It was also discovered that other conversations had been recorded between Joseph and State investigators. It was disclosed by Joseph that the contents of the tapes were harmful to the credibility of Salt Lake City's investigation into Joseph's shooting. Scott's attorneys requested that the tapes be provided to them in the course of discovery. Joseph's attorneys Bruce Oliver and Roger Bullock argued that the tapes had no relevance in this matter but agreed to provide some of the tapes after they had a chance to review them. Joseph's attorneys informed Scott's attorney that it would take some time to review the tapes before they could turn the relevant ones over. (R. 073-74; 110-12).

27. Stonebrook was present during the depositions and confronted Joseph's attorney, Bruce Oliver, and demanded the tapes. Oliver informed Stonebrook that he would not turn over anything until he personally had the opportunity to review the tapes. Stonebrook then threatened to dismiss Joseph's termination hearing before the Civil Service Commission if the tapes were not turned over to her. (R. 129-132; 095-6).

28. The following day, March 30, 2001, Stonebrook demanded that Joseph's civil service attorney, Erik Strindberg produce all the tapes by 6:00 p.m or she would have the Commission dismiss Joseph's termination hearing. Strindberg informed Stonebrook that

the tapes were not relevant to Joseph's termination hearing and reminded Stonebrook that she had already stipulated that the commission would not hear evidence related to Joseph's shooting incident and that the only issue that will be addressed before the Commission would be Joseph's fitness for duty. Strindberg also argued that there was no official order by the Commission to compel, nor did the Commission ever identify what tapes or documents they wanted. Strindberg also pointed out that the tapes were part of Joseph's civil rights case against Salt Lake City and that they would be produce in due time through the proper discovery procedures. (R.121-22; 099).

29. Strindberg argued that the request was unreasonable, broad and overly burdensome for Joseph to produce all the tapes. Even if the order from the commission was valid it would have been impossible for Joseph to duplicate the tapes in time to satisfy the City's unreasonable expectations. (Ms. Stonebrook has since been provided with 37 tapes with over 80 conversations in the Scott v. Salt Lake City case). (R.111; 106-7).

30. Officer Joseph had produced items for Ms. Stonebrook on previous occasions but was unable to produce Dr. Golding's report because Ms. Stonebrook in return failed to produce documents such as Joseph's complete pre-employment evaluation, correspondence between Dr. McCann and the City and Joseph's most recent merit evaluation by Sergeant Scott White which were crucial to Joseph's case and essential for Dr. Golding's evaluation of officer Joseph. As of March 15, 2001, these items among others had not been provided by Ms. Stonebrook and the hearing was scheduled for March 22-23, 2001. Joseph's last request for these documents was on April 2, 2001, just days before the Commission dismissed the case. (See Request for Transcript filed May 16, 2001).

31. On February 29, 2000, in a motion hearing before the civil service on the deadly force

matter the Commission refused to enforce a subpoena compelling the City to produce certain documents relevant to Joseph's case that would show that the City acted arbitrarily by ruling him not justified in the use of deadly force. The City argued that the documents were not relevant to Joseph's case and to produce the documents would be overly burdensome.

32. The Commission has once again shown that they have a predisposed prejudice to the City's self-serving interests in violation of Joseph's due process rights by failing to act on the evidence and continuously demonstrating that they cannot act impartially. (R. 198).

33. Stonebrook used the Civil Service Commission in an attempt to get the tapes, not relevant to Joseph's termination hearing, because the tapes are harmful to the City's case, Joseph vs. Salt Lake City and Scott vs Salt Lake City. Stonebrook was advised by Joseph's attorney's, Bruce Oliver and Roger Bullock that relevant tapes would be turned over to Scott's attorney and to the City after they have had the opportunity to first review the tapes. (R. 111; 126-27).

34. Salt Lake City "Stonebrook" and the Civil Service failed to produce a certified order to compel Joseph to do anything, and then violated Joseph's due process rights by threatening an unlawful action as a means of intimidation, once again bringing into question the integrity of the Civil Service Commission. (R. 118; 001-02).

35. Ms. Stonebrook and the Commission have violated Officer Joseph's due process rights by refusing to hear the case and have attempted to gain access to evidence not applicable to the matter before the Commission by way of threat, exploitation and abuse of alternative procedures. (R. 106-07).

36. On March 30, 2001, Joseph's attorney Eric Strindberg delivered Stonebrook 258

pages of documents and other exhibits in response to the City's request. Stonebrook had previously been informed that Eric Strindberg would be out of the office on March 30, 2001 and would provide her with the two requested tapes on Monday April 2, 2001, after he had been given the opportunity to listen to the tapes. Joseph delivered the requested tapes to Strindberg's office on March 30, 2001, and the tapes were delivered to Stonebrook on April 2, 2001, after they were reviewed by Strindberg. (R. 110-11)

37. On April 2, 2001, Ms. Stonebrook after receiving the 258 pages of documents and two audio tapes filed a Motion to Enforce Order. (The Commission never produced a written order, nor did they identify any specific items of evidence that needed to be produced.) (R. 071-75; 066-67).

38. On April 4, 2001, Strindberg notified the Civil Service Commission and informed them that he intended filing a motion in opposition to the City's motion to enforce the order. (R. 124).

39. On April 9, 2001, the Civil Service with deliberate indifference for Joseph's due process rights, dismissed the termination hearing without giving Joseph opportunity to respond to the City's motion to enforce the Commission's alleged order. (R. 108-09).

40. On April 17, 2001, Joseph filed a Motion to Strike Order of Dismissal and allow the Hearing to go Forward.(R. 110-132).

41. On April 19, 2001, the Commission heard arguments from Strindberg against the Order of Dismissal. The Commission denied Joseph's Motion to Strike and enforced it's original order on April 23, 2001. (R. 190-214).

42. On May 7, 2001, Joseph filed a Petition for Review with the Utah Court of Appeals, pursuant to Rule 14 of the Utah Rules of appellate Procedure and Utah Code Ann. § 10-3-

1012.5.

SUMMARY OF ARGUMENT

The Commission effectively denied Officer Joseph his due process rights when they dismissed Joseph's termination hearing without good cause.

The Commission acted arbitrarily and with bias in matters of evidence and allowed the City and Ms. Stonebrook to abuse Joseph's due process rights while serving their own interests. The Commission failed to produce an official certified order compelling Joseph to do anything, nor did the Commission identify what items of evidence it required him to produce and what their relevance was to the appeal.

The City and Ms. Stonebrook used the Commission to extort by threat of dismissal evidence not relevant to the proceedings and intended for other matters before the Federal Court. Ms. Stonebrook with deliberate indifference to Joseph's due process rights used the Commission to exploit alternative procedures.

The Commission acted with prejudice against Joseph by allowing City Attorney Martha Stonebrook to act as counsel for the Commission in violation of their own rules being in clear conflict of interest.

The Commission abused its discretion and acted with bias when it dismissed Joseph's appeal without a hearing. The Commission's findings, ruling and punishment are inconsistent and grossly disproportionate to the offense.

ARGUMENT

POINT I.

THE COMMISSION VIOLATED OFFICER JOSEPH'S DUE PROCESS RIGHTS

The Petitioner has a property interest in continued public employment and is

entitled to notice and an opportunity to be heard before any deprivation of that interest. The Commission did not afford due process consistent with that required in Utah Code Ann. § 10-3-1012 (1996)

The Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of property without due process of law. See U.S. Const. Amend. XIV, Sec. 1. While the Constitution guarantees due process before the deprivation of property interests, such interests are not created by the Constitution. Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." *Id.*

In *Board of Regents v. Roth*, the United States Supreme Court stated that public employees have a property interest in continued employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge. See *id.* at 576-78, 92 S. Ct. at 2708-10. If a property interest in continued employment exists, then the employee is entitled to procedures comporting with the minimum requirements of due process, as provided in the Constitution. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1492 (1985) ("[M]inimum [procedural] requirements [are] a matter of federal law[;] they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." (quoting Vitek v. Jones, 445 U.S. 480, 491, 100 S. Ct. 1254, 1263 (1980))). If no

property interest exists, then the employee must rely solely upon any procedural protections afforded by contract, ordinance, or state statute.

In this case, the Court should look to state law, specifically the Civil Service statute, Utah Code Ann. § 10-3-1012 (1996), to determine whether Joseph has a property interest in continued employment as a police officer absent "sufficient cause" for discharge. Section 10-3-1012 provides, in pertinent part:

All persons in the classified civil service may be suspended as provided in Section 10-3-912, or removed from office or employment by the head of the department for misconduct, incompetency, failure to perform his [or her] duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission. . . . which shall fully hear and determine the matter. Utah Code Ann. § 10-3-1012 (1996) (emphasis added).

The statute specifically lists the reasons for which a civil service employee may be discharged. The reasons supporting discharge are clearly directed at employee behavior that "is detrimental to the efficiency of the employing agency." Arnett v. Kennedy, 416 U.S. 134, 162-63, 94 S. Ct. 1633, 1648-49 (1974) (interpreting statute providing for discharge for "such cause as will promote the efficiency of the service" to prohibit discharge "without cause"). This language, with "unmistakable clarity," grants civil service employees security against discharge "without cause," *id.* at 154, 94 S. Ct. at 1644, and thus limits both the department heads and the Commission's discretion in making employment decisions. See Marvin v. King, 734 F. Supp. 346, 354 (S.D. Ind. 1990) (stating Commission cannot base discharge on "arbitrary matter [upon] which employers of at-will employees are free to base their employment decisions"); Boreen v. Christensen, 884 P.2d 761, 767 (Mont. 1994). Therefore, as a civil service employee, Joseph has a vested right to continued employment absent a legal cause for termination.

On April 2, 2001 the City filed its Motion to Enforce. The Petitioner, through his attorney, immediately contacted the Civil Service Commission, through its coordinator, Celina Mendez-Castillo, and indicated that he intended on opposing the Motion to Enforce and would file a Memorandum in Opposition within two weeks. Notwithstanding the Petitioner's letter to the Commission, five days later, on April 9, 2001 before the Petitioner could file a Memorandum in Opposition to the City's motion, the Commission entered its Order of Dismissal for allegedly failure to cooperate with discovery. (R. 071-107; 124; 110-132).

Entering an "Order of Dismissal" before the Petitioner can be heard is clearly a violation of the Petitioner's right to due process. It is uncontroverted that the Petitioner is entitled to a full and fair hearing on his grievance. See Lucas v. Murray City Civil Service Commission, 949 P.2d 1046 (Utah App. 1997). This, by necessity includes the right to be heard on all matters which affect the Petitioner's right to a hearing. The Petitioner was denied the opportunity to be heard on the matter of the City's Motion to Dismiss. The Commission is so ruling, effectively and with deliberate indifference to the Petitioner, deprived him of his due process rights. The Petitioner as a Civil Service employee, is entitled to due process, as guaranteed by both the United States Constitution and the Utah Constitution.

Although the Commission is not bound by formal rules, due process requires that in a full post-termination hearing, an employee be given an opportunity to introduce evidence and cross-examine witnesses, which includes challenging witness credibility. See Post v. Harper, 980 F.2d 491, 493 (8th Cir. 1992).

It is well established in civil proceedings that both parties have a right to be heard

on any motions before the court, before the court can rule on those motions. In American Vending Services v. Morse, 881 P.2d 917 (Utah App. 1995), the Morses files a motion for an award of attorney's fees. The opposing party filed a memorandum in opposition to the motion. Before the Morses could file a reply memorandum in support of their initial motion, the court ruled. Although the only issue was the failure of the court to allow and to consider a second reply memorandum, the Court of Appeals still ruled that the trial court had erred:

It is equally clear that the trial court failed to consider the Morses' reply memorandum and its revised attorney's fee affidavit. The trial court stated: "[A]nd not having considered defendant's reply memorandum and the additional affidavit of James L. Christensen." The trial court therefore erred by entering its decision before the time allowed under Rule 4-501 to file a reply memorandum had expired and not reconsidering its decision by reviewing the Morses' reply memorandum and revised affidavit.

Id. at 926.

Here, the action of the Commission in prematurely entering an order is a much more serious violation of the Petitioner's rights. This was not a case where the Petitioner was not allowed to file a second reply or memorandum. Rather, the Petitioner was denied the fundamental right to be heard on a critical issue: Whether the very appeal should be dismissed.

The actions of the Commission in this matter are not dissimilar to those that the Court of Appeals found so troubling in Tolman v. Salt Lake County Attorney, 818 P.2d 23 (Utah App. 1991) . In that case Tolman, whose discharge was being heard by the Salt Lake County Civil Service Commission, contended that the Commission had failed to consider certain legal points that he had raised at the hearing. The Commission apparently ignored the legal points and refused to address them at all. The Court of Appeals ruled that the

failure of the Commission in Tolman to consider the legal issues raised by Tolman's motion was a violation of Tolman's right to due process. Id. at 32.

The same violation occurred when the Commission ruled to dismiss Joseph's termination appeal without considering his points and issues. This Court should find that the Commission acted with prejudice and bias when it dismissed the Petitioner's appeal. The Court should further conclude as a matter of law, that the Commission violated the Petitioner's fundamental Constitutional rights to due process.

(A). The Commission violated its own rules by failing to certify or produce an Order to Compel Officer Joseph to do anything.

Pre-termination due process requires notice of the charges, an explanation of the evidence, and an opportunity to respond. To give effect to these constitutional protections, public agencies such as the Department and the Commission promulgate rules and regulations governing disciplinary procedures. "In disciplinary proceedings, a public body must comply with its own rules and an employee being disciplined is entitled to rely upon those rules." Bell v. Civil Serv. Comm'n, 515 N.E.2d 248, 252 (Ill. Ct. App. 1987). In the case of Officer Joseph, the Commission failed to comply with its own rules when it failed to produce a written order to compel him to produce specific items of evidence, nor did the Commission identify what items of evidence it required.

The Salt Lake City Civil Service Rules and Regulations require that orders in matters dealing with disciplinary action be written orders. See Salt Lake City Civil Service Commission, Rules and Regulations 7-6-7. Commission Decisions. (1997):

1. Written Decisions. Following the hearing, the Commission shall meet in a duly noticed, closed meeting to deliberate and reach a decision. The ruling of the Commission shall be based on a majority vote of the members. In non-disciplinary appeals, the Commission may issue its decision on the record,

which will be reflected in the official minutes of the meeting, or, in its discretion, it may prepare a written decision which will become part of the record. In disciplinary appeals, the written Findings of fact, Conclusions of Law and Order shall be prepared by the Commission. The Commission may order the prevailing party to prepare a draft of a decision or Findings of fact, conclusions of Law and Order to assist the Commission in preparing its final decision and order. (Emphases added).

In the Memorandum Decision issued by this Court on November 16, 2000 in the matter of Robert L. Joseph v. Salt Lake Civil Service Commission; and Salt Lake City Corporation, Police Department, (See Utah Court of Appeals Case No: 20000729-CA) the Court ruled that the Commission failed to certify its order and comply with the Rules of Civil Procedure.

Before Judges Greenwood, Orme, and Thorne.

PER CURIAM:

Under applicable law,

[t]he finding and decision of the civil service commission upon the hearing shall be certified to the head of the department from whose order the appeal is taken, and shall be final and immediately enforced by him.

According to the records from the Civil Service Commission, the “Findings of fact, Conclusions, and Order” was signed by the chairperson of the Commission on July 19, 2000. Salt Lake City argues that Joseph had to file his notice of appeal within thirty days of July 19 th. However, there is no indication in the record that the order was “certified to the head of the department,” an apparent prerequisite to finality. Moreover, the order is not date-stamped. The cases to which Salt Lake City cites, in support of its assertion that Joseph’s notice of appeal was late, stand for proposition that an agency order is final the day it is issued, not the day it is mailed. See e.g., Bonded Bicycle Couriers v. Dep’t of Employment Sec., 844 P.2d 358 (Utah Ct. App. 1992). However, these cases involve agency orders that were properly issued and date-stamped. Id. at 360 (reiterating supreme court’s determination that “the date the order constituting final agency action issue is the date the order bears on its face.”)

Analogous agency cases have likewise required a mailing certificate showing that the claimant was given notice and an opportunity to file a timely appeal. See e.g., Buczynski v. Industrial Comm’n, 917 P. 2d 552, 555 (Utah 1996) (requiring Industrial Commission to “provide a party in interest actual or constructive notice of an order

for such party to timely file a petition for judicial review); see also Utah Code Ann. § 34A-1-302(4) (1997) (requiring Labor Commission to give “notice of the entry of a presiding officer’s order or any order or award of the commission” by mailing copy of said order to last-known address). Because there is no mailing certificate in the record, we cannot be assured that Joseph received appropriate notice of the order signed on July 19, 2000, and, therefore, even if the order had been certified and “issued” on the date, it may not be appropriate to begin counting the appeal period from July 19 th.

The Commission failed to produce a written certified order to compel the Petitioner to produce anything and then effectively gave the City an open-ended fishing license to seek discovery of items not relevant to the matter before the Commission, and at the time not available in the matter of Westley Scott v. Salt Lake City et. al.. This Court should conclude that the Commission’s order to compel was not valid because the Commission failed to comply with their own rules and regulations and in so doing violated the Petitioner’s due process rights. (R. 001-02).

(B). The Commission acted with prejudice and abused it’s discretion when it attempted to compel Officer Joseph to produce evidence not relevant to the case.

Although the Commission is not bound by formal rules of evidence and procedure, it is not above the law. See Tolman, 818 P.2d at 31. In the absence of formal legal rules, the Commission must "determine what evidence should, in 'fairness,' be admitted." *Id.* The evidence must be legally relevant, in that it has "'some probative weight and reliability.'" *Id.* (citation omitted). "Whether certain evidence is relevant . . . is a question of law, which we review under a correction-of-error standard." State v. Gonzalez, 822 P.2d 1214, 1216 (Utah Ct. App. 1991).

The Civil Service Commission is a local, municipal tribunal of limited jurisdiction. See Piercey v. Civil Serv. Comm'n, 116 Utah 135, 141, 208 P.2d 1123, 1125-26 (1994); accord Salt

Lake City Corp., 908 P.2d at 875. . The Commission is neither a court of law nor a state administrative agency subject to the Utah Administrative Procedures Act (UAPA). See Tolman, 818 P.2d at 26 n.3 (stating UAPA only applies to state, not local, agency action). In addition, as a municipal administrative body, the Commission is not bound by formal rules of evidence and procedure. See Salt Lake City Civil Service Commission, Rules and Regulations 7-6-6. Conduct of Hearings. (1997):

1. Hearing Requirements. All parties must be fully apprised of the evidence submitted to or to be considered by the Commission, and must be given the opportunity to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. Further, the Commission must address the factual and legal contentions raised by the parties.
2. Rules of Evidence. Hearings before the Commission are conducted with appropriate formality and decorum so that the due process rights of all parties are protected and the Commission may perform its function. *Utah Rules of Evidence* and *Utah Rules of Civil Procedure* are used as guidelines in the conduct of commission hearings, but are not strictly followed or applied. In keeping with its goal of obtaining all pertinent facts, the Commission does not strictly apply rules of evidence regarding authentication, foundation, hearsay or relevance.

See Pilcher v. State Dep't. of Soc. Servs., 663 P.2d 450, 453 (Utah 1983)

("Administrative proceedings are usually conducted with greater flexibility and informality than judicial proceedings[, thus,] [r]igid adherence to judicial procedures in administrative proceedings is generally inappropriate because it ignores basic differences between judicial and administrative procedures.").

The Commission didn't inquire as to the relevancy of the tapes, nor did they inquire as to the actual content of the tapes. The Petitioner had not at any time indicated that he would be using any of the tapes in the matter before the Commission. Ms. Stonebrook on the other hand stipulated on several occasions that she did not intend to retry the Petitioner's deadly force case and that the Commission would only be looking at evidence

relevant to the Petitioner's termination or fitness for duty issue. (R. 121-22).

Ms. Stonebrook abused the Civil Service Commission and sought by threat of dismissal evidence not relevant to the matter before the Commission by exploiting alternative procedures in violation of the Petitioner's due process rights.

Completely ignored in the City's Motion to Enforce is the fact that the issue of the tapes was concurrently raised in other civil litigation involving the City, in which Ms. Stonebrook is acting as counsel. During depositions in that case Ms. Stonebrook told Joseph's attorney Bruce Oliver, that Joseph had to produce two tapes by the 30th of March. These two tapes were produced to Ms. Stonebrook. Later, the parties in the civil litigation discussed other tapes after they were referred to in Joseph's deposition. It was agreed that Mr. Oliver and Joseph's other defense counsel, would review all of the tapes, would copy all conversations involving City employees on separate tapes, would then make complete copies of those tapes, and distribute them to all the parties in the litigation. One of those parties is the City, represented by Ms. Stonebrook. Ms. Stonebrook apparently agreed to this arrangement and understood that she would receive copies of all relevant tapes. (R.115-16).

In the City's Motion to Enforce dated April 2, 2001, Ms. Stonebrook omits the fact that the Petitioner delivered some 258 pages of requested documents on March 30, 2001 and then produced the two requested tapes on April 2, 2001, prior to the filing of the Motion to Enforce. Ms. Stonebrook also fails mention that she has reviewed the tapes and then refused to return them to the Petitioner. (R. 116).

The City had been previously notified by the Petitioner's attorney, Erik Strindberg, that he would be out of the office on March 30, 2001 and would be able to review the two requested tapes until Monday April 2, 2001. The Petitioner delivered the tapes to Strindberg

by March 30, 2001, and the tapes were then reviewed by Strindberg and delivered to the City by midday April 2, 2001. (R.111).

Ms. Stonebrook states in her Motion to Enforce dated April 2, 2001, that she became aware that the Petitioner had many tapes during depositions in Westly Scott v. Salt Lake City and Robert Joseph. et al. These deposition took place on March 26 & 27, 2001. The Petitioner was also involved in deposition of Westley Scott which took place on March 29, 2001. It was during the time of this deposition that Ms. Stonebrook demanded that the Petitioner produce all tapes referred to during his deposition from the day before by the close of business on March 30, 2001(the following day) under threat of dismissal without any discussion as to the tapes relevancy to the matter before the Commission. (R. 071-73).

The Petitioner's attorney, Bruce Oliver informed Ms. Stonebrook and the other five attorneys present in the depositions that no tapes would be released before he had the opportunity to review the tapes. It was agreed that the Petitioner would provide the tapes to attorney Roger Bullock who would review the tapes with Bruce Oliver and determine which tapes will be duplicated and provided to the various other attorney's including Ms. Stonebrook. (R.110-132).

Ms. Stonebrook's demand was unreasonable and her attempts to extort the Petitioner to produce the tapes under threat of dismissal was inappropriate and a violation of the Petitioner's due process rights. The fact that the Petitioner was given one day (March 30, 2001) to produce the tapes as disclosed during depositions between March 26-29 was unreasonable and overly burdensome, not to mention financially impossible for the Petitioner. Issues related to who would bear the cost of production were not finalized until the following week when it was determined that Roger Bullock, the City's appointed counsel

for the Petitioner and co-counsel with the City in Westley Scott v. Salt Lake City & Robert Joseph et. al., would bear the cost of production and distribution. (R. 171-75; 102-3; 106-7).

The Petitioner eventually produced 37 tapes containing over 80 different conversations to Bruce Oliver and Roger Bullock who in turn provided them to the City “Ms. Stonebrook” after they had been reviewed and duplicated. The tapes were relevant to the case Westly Scott v. Salt Lake City & Robert Joseph et. al., but were outside the stipulated guidelines made by Ms. Stonebrook for the civil service hearing on the Petitioner’s termination. Ms. Stonebrook stipulated a number of times that she would not retry the Petitioner’s deadly force appeal and would not except any evidence in the hearing not directly related to the Petitioner’s fitness for duty. The only tape that had any relevance to the Petitioner’s fitness for duty was the tape recorded interview with the departments psychologist, Dr. McCann which was provided to the City on April 2, 2001.

In light of these additional facts, all of which were omitted by the City’s Motion to Enforce, dismissal of the Petitioner’s grievance is at best punitive. The Commission had not set an actual hearing date for the termination grievance and even refused to do so at its March 15, 2001, hearing. (R. 066-7). Accordingly, there has been, and will be, absolutely no prejudice to the City. (R116).

The City fails to establish how these procedural errors were harmful, e.g., the City was prejudiced by failure to produce the tapes by March 30, 2001, when there was no date set for the hearing or, the City did not have time to prepare for the hearing or, how these procedures would have resulted in a different outcome absent such errors. See, e.g., Loudermill, 470 U.S. at 547, 105 S. Ct. at 1496; cf. State v. Knight, 734 P.2d 913, 920 (Utah 1987) (“[T]he likelihood of a different outcome must be sufficiently high to undermine

confidence in [the decision]."); State v. Villarreal, 857 P.2d 949, 958 (Utah Ct. App. 1993) (stating evidence must be "sufficiently inconsequential that we conclude there is no 'reasonable likelihood that the error affected the outcome of the proceedings'" (quoting State v. Verde, 770 P.2d 116, 120 (Utah 1989)), *aff'd*, 889 P.2d 419 (Utah 1995))).

"[a]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful." Cal Wadsworth Constr. v. St. George, 898 P.2d 1372, 1378 (Utah 1995).

This Court should find that the Commission abused its discretion and acted with bias and prejudice in violation of the Petitioner's due process rights while attempting to serve the City's interests.

(C). The Commission acted with prejudice and violated Officer Joseph's due process rights when it allowed Martha Stonebrook to act as counsel for the Commission.

The Commission exceeded its statutorily limited authority in allowing Martha Stonebrook to act as its legal advisor to actively participate, and make sua sponte rulings as to the admissibility of evidence during the hearing. A conflict would arise if the Commission's legal advisor simultaneously served as both an advocate and an advisor. See Hamilton v. City of Mesa, 916 P.2d 1136, 1143 (Ariz. Ct. App. 1995). However, absent a showing of any actual bias or partiality, there is no due process violation. *See, e.g., id.* (holding city manager seeking advice from independent legal advisor, absent showing of actual bias or partiality, insufficient to establish due process violation).

Because Section § 10-3-1012 confers upon civil service employees a property interest in continued employment, we must determine what process is due. The essential principle of due process requires that a deprivation of any significant property interest "be preceded by

notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950) (emphasis added). "An employee's right to fair notice and an opportunity to 'present his [or her] side of the story' before discharge is not a matter of legislative grace, but of 'constitutional guarantee.'" Loudermill, 470 U.S. at 541, 105 S. Ct. at 1493. Post-deprivation procedures, while not constitutionally guaranteed, must comport with due process requirements providing for a fair hearing. See Loudermill, 470 U.S. at 546, 105 S. Ct. at 1496 (stating due process requires post-termination administrative procedures "at a meaningful time" as provided by statute); see also Bunnell v. Industrial Comm'n, 740 P.2d 1331, 1333 (Utah 1987) ("[E]very person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal.").

The Commission acted with bias against the Petitioner during the Motion to Strike hearing when it looked to Ms. Stonebrook for counsel on matters of law, which is evident in statements made by Commission.

RR: I think Ms. Stonebrook has an argument that maybe, will be informative to those of us who are not lawyers. What about the question of due process?
(R. 198)

The fact that Ms. Stonebrook is representing the Commission against the Petitioner in the other matters before this Court and at the same time is lead counsel for the City in Robert Joseph v. Salt Lake City and Westley Scott v. Salt Lake City and Joseph et. al., demonstrates a clear conflict of interest. Matters before the Commission, and Ms. Stonebrook's involvement as counsel could have a profound impact on the outcome of other cases before the Federal Courts. Ms. Stonebrook has a vested interest in the outcome

of these cases and any legal advisory role is inappropriate and a violation of the Petitioner's right to a fair and impartial hearing. The Petitioner has been prejudiced by Ms. Stonebrook's involvement and there has been a clear disparity of treatment in matters of discovery.

Ms. Stonebrook has failed to provide the Petitioner with his first request for discovery by failing to produce his complete pre-employment evaluation. The basis of the Petitioner's termination on March 31, 2000, was Dr. McCann's psychological evaluation in which he believed that the Petitioner had been suffering from psychological problems since adolescence. Dr. McCann's evaluation comprised of approximately one hour interview in which he attempted to convince the Petitioner that his claims of civil rights violations by the City against him were "unjustified doubts." The Petitioner's pre-employment evaluation in 1997 by Dr. Thomas Reidy however, comprised of hours of testing and interviews that did not show any sign of present or past psychological problems. This was also confirmed in the Petitioner's post shooting evaluation in 1998, and in two subsequent evaluations by two different evaluators. The Petitioner's complete pre-employment evaluation is harmful to the City's case.

The City has failed to produce his complete pre-employment evaluation which is paramount to the termination appeal before the Commission and had not been provided at the time of the March 15, 2001, hearing in which Ms. Stonebrook demanded tapes not relevant to the case or not intended to be used by the Petitioner, under threat of dismissal. It is apparently clear, that the Commission looked to Ms. Stonebrook for advise on matters of law, and allowed her to exploit by alternative procedures evidence intended for use in other matters outside the Commission. The Petitioner has been prejudiced by the Commission's actions and there has been an obvious disparity in matters of discovery and a

violation of the Petitioner's due process rights.

The scope of authority given to administrative agencies is limited. The Utah Constitution delegates all power to charter such agencies to the State Legislature. Utah Const. Art. XI, Sec.5. The Legislature has narrowly tailored the organization and authority of agencies. Utah Code Ann. § 10-3-1001 to 06. The Utah Supreme Court has held that whenever a question arises as to whether an administrative agency has the authority to act in a manner not expressly provided by statute, courts must error towards restricting the agency's authority rather than allowing un-permitted acts to occur. Williams v. Public Serv. Comm'n, 754 P.2d 41 (Utah 1988). Courts reviewing actions of commissions "should be bound by the principle" that when a "specific power is conferred by statute upon a...commission with limited powers, [its] powers are limited to such as are specifically mentioned." Union Pac. R.R. v. Public Serv. Comm'n, 134 P.2d 469, 474 (Utah 1943) (emphases added). "To ensure that the administrative powers of the [Commission] are not overextended, any reasonable doubt of the existence of any power must be resolved against the existence thereof." Williams, 754 P.2d at 50. Furthermore, the Utah Code requires a civil service commission to create and presumably follow its own rules and regulations. See Utah Code Ann. § 10-3-1006. See Salt Lake City Civil Service Commission, Rules and Regulations 1-3-2. Civil Service Commission- Legal Counsel. (1997).

Legal Counsel for the Commission may be provided, as necessary, by the Office of the City Attorney. When such representation is provided by the City Attorney, due care should be taken to avoid possible conflicts of interest. In cases of conflict of interest, independent counsel may be retained by the Commission in accordance with Section 2.16.060 of the Salt Lake Code. (emphases added).

The Commission erred in granting the City's motion to compel the Petitioner to produce the evidence without giving any reasoning and without making any findings or

conclusions to support its decision. This court has emphasized that an administrative agency must make findings of fact that are sufficiently detailed so as to permit meaningful appellate review. See Adams v. Board of Review of Indus. Comm'n, 821 P.2d 1, 4 (Utah Ct. App. 1991).

For us to meaningfully review the Board's findings, the findings must be ""sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached" The failure of an agency to make adequate findings of fact in material issues renders its findings "arbitrary and capricious" unless the evidence is "clear, uncontroverted and capable of only one conclusion.""" Id.at 4-5 (quoting *Nyrehn v. Industrial Comm'n*, 800 P.2d 330, 335 (Utah Ct. App. 1990) (citations omitted)). In this case, the Commission's decision granting Murray City's Motion in Limine without providing any findings, conclusions, or reasoning was arbitrary and capricious. Therefore, the Commission abused its discretion.

This Court should find that the Petitioner's due process rights were violated by the Commission which greatly prejudiced the Petitioner's right to a full and impartial hearing by having Ms. Stonebrook represent and advise the Commission on matters of law. (R. 198; see also, *Robert Joseph v. Salt Lake City Civil Service Commission* No: 20001111-CA).

Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; it is flexible and requires such procedural protections as the particular situation demands. In an analysis of a procedure, an important factor is the risk of an erroneous deprivation of a private interest through the procedures, and the probable value, if any, of additional or substitute procedural safeguards."

POINT II.
DISMISSAL OF THE APPEAL IS AN ABUSE OF OFFICER JOSEPH'S DUE
PROCESS RIGHTS.

Section 10-3-1012 states the Commission "shall fully hear and determine" appeals of suspension or termination brought by civil service employees. The Utah Supreme Court, in Vetterli v. Civil Service Commission, 106 Utah 83, 145 P.2d 792 (1944),

established that the Commission's review of disciplinary decisions involves two inquiries: (1) Do the facts support the charges made by the department head, and, if so, (2) do the charges warrant the sanction imposed? See id. at 796; Vitek v. Jones, 720 P.2d 1356, 1361 (Utah 1986). If the Commission answers no to either of these inquiries, it must reverse the department head's actions.

Furthermore, under the specific circumstances of this case, the second question—"do the charges warrant the sanction imposed," In re Discharge of Jones, 720 P.2d 1356, 1361 (Utah 1986)—breaks down into two sub-questions: First, is the sanction proportional; and second, is the sanction consistent with previous sanctions imposed by the department pursuant to its own policies. See Lucas v. Murray City Civ. Serv. Comm'n, 949 P. 2d 746, 761 (Utah Ct. App. 1997).

(A). The Commissions Findings, Ruling and Punishment were Inconsistent and Grossly Disproportionate to the Offense.

Dismissal is an excessive disciplinary action for his alleged offense. In this case in determining whether the charges warrant the disciplinary action taken, the Court must consider several factors. Firstly, was the Commission's order to compel valid according to their own rules, and in compliance with the law. Secondly, were the requested tapes relevant to the matter before the Commission. Thirdly, was the request abuse of office allowing Ms. Stonebrook to use the Commission to gain access to evidence through exploiting alternative procedures. Fourthly, did the failure to produce the tapes by March 30, 2001, somehow prejudiced the City when there was no hearing date set.

In considering these factors the Court will conclude that the Commission abused discretion and exceeded the range of sanctions permitted by statute or regulation, or if, in

light of all the circumstances, the punishment was disproportionate to the offense. See id.; see also Boyce v. United States, 543 F.2d 1290, 1295 (Ct. Cl. 1976) ("If a penalty is so harsh as to constitute an abuse, rather than an exercise of discretion, it cannot be allowed to stand." (citations omitted)).

The City "Ms. Stonebrook" cannot simply demand that the Petitioner turn over irrelevant material and then use his reticence as a basis to seek dismissal of this action. The Petitioner has in good faith attempted to cooperate with Ms. Stonebrook's global requests for irrelevant materials without placing in jeopardy other matters before the Federal Courts.

In disciplinary proceedings, a public body must comply with its own rules and an employee being disciplined is entitled to rely upon those rules. " Bell v. Civil Serv. Comm'n, 515 N.E.2d 248, 252 (Ill. Ct. App. 1987)

When this discretion is abused, however, if the punishment exceeds the range of sanctions permitted by statute or regulation, or if, in light of all the circumstances, the punishment is disproportionate to the offense. See id.; See also Boyce v. United States, 543 F.2d 1290, 1295 (Ct. Cl. 1976) ("If a penalty is so harsh as to constitute an abuse, rather than an exercise of discretion, it cannot be allowed to stand." (citations omitted)).

The Petitioner acknowledges that he has no history of inconsistency to turn to, he is not without recourse. While the Petitioner may have no basis to claim disparity, the Petitioner still retains the protection of proportionality review. See Vitek v. Jones, 720 P.2d 1356, 1361 (Utah 1986)

If this Court concludes that the Commission's order was indeed valid, and that the request for irrelevant tapes was not an abuse of discretion by the Commission, then this

Court should consider that the Commission's ruling and Order of Dismissal was grossly disproportionate to the offense and overturn the Order of Dismissal and remand the case back to the Commission for a hearing.

CONCLUSION

The Commission's decision to Dismiss the Petitioners termination hearing was a gross violation of State and Federal Constitutional Due Process Rights. The Commission's conduct was bias and prejudice towards the City's "self-serving interests." The Commission's conduct and ruling was not based on law, was unreasonable, and clearly arbitrary capricious and draconian. The City, (Martha Stonebrook) inappropriately acted as counsel for the Commission in an obvious "conflict of interest."

The City has repeatedly failed to produce evidence (Joseph's complete pre-employment evaluation) and denied the existence of evidence (Sgt. Whites merit rating of Officer Joseph) beneficial to the Petitioner's case. The City has shown an obvious disparity when dealing with issues of discovery.

The Commission failed to certify, or even issue an order to compel the Petitioner to produce anything, and then enforced an unofficial order. The Commission granted the City a global request for discovery and acted with bias when it attempted to extort the Petitioner into providing tapes for the City that were irrelevant to the termination hearing.

First and foremost, this Court should recognize that the City and the Commission violated the Petitioners due process rights, acted with bias and prejudice in favor of the City's "self-servicing interests." The Commission failed to certify an order to compel the Petitioner to do anything, failed to identify specifically what items it wanted or what the relevancy of the items were to the case before them. Secondly, the Commission issued

an Order of Dismissal before the Petitioner's could respond to the City's Motion to Enforce.

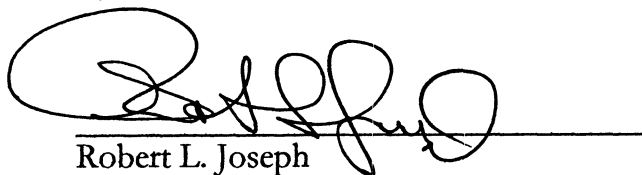
This Court should recognize that the City's request for all the tapes was unreasonable, overly broad, burdensome, and irrelevant to the matter before the Commission. This Court should also conclude that the Commission dismissed the Petitioner's appeal without good cause and that their decision could not have reasonably have been based on any law or the evidence presented by the City to show relevancy, which lacked substantial support.

Therefore, the Court should order Salt Lake City to reinstate Officer Joseph with full back pay, benefits and retirement. The Petitioner also pleas to the Court that the City be ordered to pay reasonable legal fees in connection with the Civil Service Hearings and the matter before the this Court.

Alternatively, the Petitioner pleas to the Court that the case be remanded back to the Commission for a hearing based upon the Commission's abuse of the Petitioners due process rights.

DATED this 17th Day of September, 2001.

By Petitioner Pro-se



Robert L. Joseph

Petitioner's Address:
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Sandy, Utah 84094
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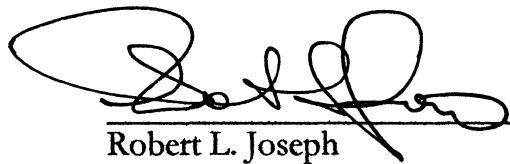
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served VIA HAND DELIVERY a true and correct copy of the foregoing on this 17th day of September 2001, to:

Chief Charles "Rick" Dinse
Salt Lake City Police Department
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Eighth Floor Administration
Salt Lake City, Utah 84111

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Robert L. Joseph